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No. 1019

In the Supreme Court of the United States

OCTOBER TERM, 1969

GEORGE BRAVOS, JOSEPH LOMBARDI, SAM MERCURIO and WILLIAM MESSINO,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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Petitioners pray that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this cause on September 9, 1969.

OPINION BELOW

The opinion of the Appellate Court is not reported, but is reprinted herein as Appendix A, *infra.*

JURISDICTION

The judgment of the Appellate Court (Appendix B, *infra*) was entered on September 9, 1969. A timely petition for rehearing was denied on October 7, 1969 (Appendix C, *infra*). A timely Petition for Leave to Appeal to the Illinois Supreme Court from the judgment of the Appellate Court was denied on November 24, 1969 (Appendix D, *infra*). Petitioners' motion to stay the mandate of the Illinois Supreme Court pending filing and disposition of this Petition was granted by Justice Walter V. Schaefer of the Illinois Supreme Court, sitting in vacation. (Appendix E, *infra*). This Petition is filed within 90 days of the final order of the Illinois Supreme Court denying leave to appeal. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether it is coercive, and thus a denial of petitioners' Sixth Amendment rights to trial by jury and their Fourteenth Amendment rights to a fair trial under due process of law, for the trial judge to return a jury for seven hours further deliberation after he has received unsolicited advice from the jury foreman following approximately eight hours of deliberation that the jury is "completely deadlocked" eleven to one for conviction, and the one juror "just * * * [does not] believe the case was proven?"

2. Whether it is a denial of petitioners' Sixth Amendment rights of confrontation and cross examination and their Fourteenth Amendment rights to a fair trial under due process of law for the trial judge to deny motions for a severance from a confessing co-defendant, when the

prosecution, during rebuttal, introduces evidence of a confession, made three months after the charged substantive offenses and narrative of past events, which implicates and incriminates the objecting petitioners?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *; to be confronted with the witnesses against him; * * *"

The Fourteenth Amendment to the Constitution provides in pertinent part:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law; * * *"

STATEMENT

Petitioners Bravos, Lombardi and Messino were indicted by the Grand Jury of the Circuit Court of Cook County for, and subsequently convicted after joint trial by jury of, the offenses of kidnapping (two counts), aggravated battery (two counts), and conspiracy. Petitioner Mercurio was jointly indicted for the crimes of conspiracy and kidnapping, tried together with the others, and convicted of the conspiracy, but acquitted of the kidnapping charges.[1] Bravos was sentenced to the Illinois State Penitentiary for various terms aggregating a minimum of five and a maximum of twenty years; Lombardi was sentenced to the penitentiary for terms aggregating a minimum of seven and a maximum of twenty years; Messino was sentenced to the penitentiary for terms aggregating a minimum of ten and a maximum of thirty years. Mercurio was sentenced to a period of five years probation, conditioned upon incarceration in the Cook County Jail for thirty days.

Evidence

Background

In June 1964, S. George, Albert and Jack Chiagouris, brothers and co-partners in a construction business, arranged to borrow $50,000 from Messino and Bravos. At the time, Albert asked Bravos what security would be required, and Bravos replied, in a manner similar to what the brothers had heard from bankers and which did not terrify or otherwise intimidate the brothers, "The only security we want is your eyeballs." (A. 102-4, 179, 206-7, 248)[2] Following a discussion, Messino said the interest

[1] Two co-defendants, Sander Caravello and Alice Erwin, named in the conspiracy count and the conspiracy and kidnapping counts, respectively, were acquitted by direction of the trial judge during trial.

would be $70,000 and, together with the principal, would be payable over a 47-week period at the rate of $1,500 per week for 46 weeks and $1,000 in the 47th week. (A. 104, 207) Two days later, when they received the loan, the brothers were introduced to Lombardi whom Messino said would receive their repayments in the event he were not available. (A. 105-6, 208)

At the end of July 1964, the brothers arranged to borrow an additional $100,000 for 105 days from Bravos and Messino. They were told this loan would cost $30,000; installments of $10,000 were to be paid after the 35th and 70th days and a final payment of $110,000 was to be made at the conclusion of the 105-day period. (A. 108, 211-2)

In individual and partnership financial statements submitted to various financial institutions at the end of 1964 and the beginning of 1965 for the purpose of obtaining other loans, the Chiagouris brothers failed to list either of these alleged loans, or the indebtedness represented thereby. (A. 322-3) These statements, dated November 30, 1964, purported to contain an enumeration of the brothers' assets and liabilities as of that date; each contained the legend that it was "a true and accurate statement" of the signator's financial condition. (A. 317-8, 327-8)

According to the Chiagouris brothers, repayment on the first loan commenced immediately following its receipt. (A. 107-8, 213) The payment due on October 9, 1964, was not made. On October 10th, they had a meeting with Messino

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[2] "A....." references are to the page of the printed "Abstract of Record" prepared and filed in the State court pursuant to Illinois appellate practice (see, Ill.Rev.Stat.1967, Ch. 110A, par. 342(e)), a copy of which has been certified to this Court by the Clerk of the Appellate Court of Illinois, First Judicial District.

during which Messino cursed them and hit Jack. They then made the $1,500 payment, after which they discussed with Messino their inability to make the impending second payment on the second loan, the first payment having been made in September. After some discussion, Messino told the brothers they would be charged a penalty of $1,000 a day for every day they were late in making this second payment. The brothers claimed they made the payment two days late. (A. 110-2, 214-5)

In November 1964, the brothers met with Petitioner Mercurio to discuss his assistance in obtaining financing for them. According to George, Albert told Mercurio privately of their need for funds to repay the second loan. (A. 212) Albert did not testify to this conversation. Jack said he told Mercurio of their indebtedness. (A. 215) Jack could not remember whether their attorney was present at this meeting. (A. 188) Albert said their attorney was never present at a meeting with Mercurio. (A. 317) The attorney, an Assistant Corporation Counsel for the City of Chicago, testified that he was present at a meeting between the Chiagouris brothers and Mercurio which he thought took place in the fall or late summer of 1964. The location and general subject of the meeting described by the attorney was the same as that described by the brothers, except that the attorney denied there was any conversation concerning a loan from Messino and Bravos, or that any one of the brothers took Mercurio aside for a private conversation. (A. 282-3) Mercurio, too, denied that any conversation concerning the loans from Messino and Bravos occurred at this meeting. (A. 355-6)

A few days later in November the brothers met Messino, Bravos and Lombardi at a cocktail lounge. The brothers said they did not have the final payment on the second loan. Messino asked Bravos if he knew the brothers had given

$40,000 from their loans to Sander Caravello (a co-defendant acquitted by direction of the trial judge). He then asked for permission "to take these fellows out and put a bullet in their head." (A. 113, 216) Bravos told the brothers they would pay $10,000 interest every thirty days until they paid the $100,000 principal. Lombardi was instructed to get Caravello. Before he returned, Bravos left the lounge. When Caravello returned with Lombardi, according to Jack and George Chiagouris, he was threatened and beaten by Messino. (A. 113-4, 216-7) Although the cocktail lounge was fairly crowded at the time, and the tables were closely spaced, no one interceded or made any inquiry. (A. 253, 276) Of the persons present in the lounge on that occasion, only Jack and George Chiagouris testified to the alleged incident.

Payments on the two loans were allegedly made to Messino and/or Lombardi during the following months. (A. 114, 131, 217-8) In February the brothers told Lombardi they would be unable to make the payment on time, and Lombardi placed a long distance call to Messino, who told George, over the phone, that he would fly to Chicago "to get this thing straightened out" if the payment were not made. (A. 132) The payment was made a few days later. (A. 133, 220)

In the middle of March, 1965, George and Jack met Messino and Bravos. On hearing that the brothers did not have the $100,000 with which to pay off the second loan, Bravos and Messino threatened to choke the brothers and demanded that the money be paid. A request for a moritorium was rejected. (A. 134, 220-1)

Substantive Offenses

The brothers were unable to make the payment which was due on May 7, 1965. They went out of town that day

and then called Messino at the "Wow" Restaurant. Messino ordered them to return to Chicago. They drove to the Chicago Loop where Albert left his two brothers to return home. Jack and George went to the restaurant where they met Lombardi, Messino and Bravos in a picnic area adjacent to the restaurant. (A. 136, 223, 308) The restaurant, located less than two blocks from a police station, was well-lighted; the picnic area was also lighted. A number of people were inside the restaurant; several people sat on a bench in the picnic area approximately fifteen to twenty feet from where the brothers and the Petitioners sat. (A. 181-2, 273-4, 386) Defense witnesses said the area was well lighted and occupied by a lot of people. (A. 386, 429) Although Jack Chiagouris "imagined" these people witnessed the incidents which followed and both brothers said they cried out when hit, no one came to the brothers' assistance, or otherwise intervened. (A. 182, 274) Only Jack and George Chiagouris testified for the State as to what occurred.

After a discussion as to Albert's whereabouts and the failure of the brothers to make a payment on the loans, Messino and Lombardi allegedly struck and beat both Jack and George, causing bruises, bleeding and a disarray of clothing. (A. 136-8, 223) Jack claimed he suffered a broken jaw as a result of the beating, but, when he first visited his dentist ten days later, on May 17th, he told the dentist that he had been injured at a construction site when a laborer had accidentally hit him with a board. The dentist opined that this injury had been incurred sometime after May 10th. Jack also told a doctor who treated him on May 19th or 20th that he had been injured ten days earlier by a carpenter who had hit him with a board. (A. 234, 278, 283-5)

After the brothers made two unsuccessful attempts to telephone Albert at their home, Bravos told them they would not be let loose until they provided security for the money they had borrowed. (A. 137-8, 223-4) George then said they had a beneficial interest in a trust which they could assign as security. Bravos agreed and said they would have Mercurio receive the assignment of the beneficial interest. (A. 138-9, 224) Later that night, Mercurio arrived at the picnic area and was told the brothers were going to assign their beneficial interest in a trust to him. Bravos told him to contact Albert Chiagouris and make arrangements at the bank for the next day. (A. 139)

According to Albert, he talked to Mercurio by telephone several times that evening, inquiring as to the whereabouts of his brothers and their well-being. He said Mercurio told him they were with Bravos and Messino, that they had been slapped around a little, and that he was going to receive an assignment of their trust interest the next day as security for the money they owed Bravos and Messino. (A. 308-10, 318)

In the meantime, Lombardi and Messino took Jack and George to a cocktail lounge. Bravos joined them there. Again, both brothers tried to call Albert at home, but were unsuccessful. (A. 139-41, 226) From the cocktail lounge, Messino drove both brothers to Miss Erwin's apartment. They remained there for approximately thirty minutes, and then went to Messino's home. Later that morning, Lombardi arrived at the home and the four men drove to Caravello's office where Messino made a telephone call. Messino then told the brothers that everything was arranged at the bank for the brothers to assign their interest and they were free to leave. (A. 142-5, 226-31) Lombardi drove the brothers to the Wow Restaurant, where the brothers picked up their car and drove to Savings & Loan Association to

meet Mercurio. (A. 145, 231) Mercurio and the two brothers drove to the bank where they were met by Albert and the bank's trust officer. All three brothers described George's and Jack's appearances as disheveled, unshaven, bloody, and showing evidence of bruises about the head and face. (A. 145, 232, 311) A secretary at the Savings & Loan testified that one man with a bruised and swollen face, whom she could not again recognize, asked to see Mercurio in his office on the morning of May 8, 1965. This man was "about the same" size, weight and build as Jack Chiagouris. (A. 450-1, 454) The bank trust officer, however, noticed nothing unusual about the three brothers at the time they assigned their trust interest to Mercurio, except that *Albert* appeared slightly disheveled. The brothers made no objection to the assignment in his presence. (A. 443-6)

Events Subsequent

On May 11th the brothers renegotiated the schedule of payments on the remaining money which they claimed they had borrowed. (A. 149-51, 233-34) On May 21st they paid off the first loan. (A. 151, 233) On June 2nd, however, they borrowed $15,000 from Messino which was to be repaid in 90 days with interest of $800 a month. (A. 152, 234-5)

The brothers made their first complaint to the authorities on July 28, 1965, when they were taken to the Illinois Crime Investigating Commission by their lawyer. (A. 155, 158, 166-7, 272) Thereafter they were accompanied or observed by agents of the Commission as they made various payments to Lombardi (A. 160-1, 236, 239-40, 335-6), although these agents were unable to say what amounts of money were paid at the times. (A. 336, 343)

On August 7, 1965, George Chiagouris called Lombardi and asked to postpone a payment until the following week.

This call was monitored by an agent of the Commission. During the call, Lombardi allegedly threatened George, and the two arranged to meet at a downtown hotel later that evening. Commission Agent Walker accompanied George to the meeting and, as he had on a prior occasion, posed as George's brother-in-law. Messino and Lombardi met George, Jack and Walker in the lobby of the hotel. Lombardi remained with Walker,[3] while Messino went into the cocktail lounge with George and Jack. They were joined there by Bravos. George was seen by another agent to slip money under a cocktail table to Messino. (A. 162-4, 241-2, 288-9, 337, 403-4, 461-3)

Defense Testimony

Petitioners Mercurio and Lombardi testified in their own behalf and denied the charges. Both explained that they had gone separately to the Wow Restaurant on May 7th for reasons unconnected with Messino or Bravos or the Chiagouris brothers. Mercurio denied seeing any bruises on the brothers at that time or on the following morning, and explained that he had received their trust interest as an accommodation to the brothers. (A. 362-4) Lombardi went to the restaurant to meet a friend, Gus Baltas, who also testified for the defense. Both Lombardi and Baltas denied that Lombardi was with Messino and Bravos, or the two Chiagouris brothers, that there was any commotion in the picnic area, or that the brothers appeared disheveled or bruised or restrained in any manner. Lombardi and Baltas went to the cocktail lounge after leaving the restaurant, but they left the lounge and remained together until 2:00 a.m. (A. 386-9, 428-31)

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[3] Lombardi was cross-examined and the State introduced rebuttal evidence concerning Lombardi's conversation with the agent at this time. See Statement, p. 12 *infra*.

Statement by Lombardi

Lombardi was cross-examined about a conversation he had with agent Walker while waiting for the Chiagourises in the lobby of the hotel on August 7th. (See *supra*, p. 11.) Lombardi said the two of them engaged in small talk during this time. He denied Walker told him he was worried about his brother-in-law and did not want George to get a broken jaw as had Jack. Lombardi said that Walker did not ask him why he had to be so rough on Jack, and he did not reply that it was only a broken jaw and could have been a lot worse. Finally, he denied he told Walker he had certain ways of collecting money and did not deviate from them, and that he had slapped Jack and George around a bit. (A. 422)

Prior to this cross examination, but after trial had commenced, the State disclosed that Lombardi had made an oral statement to an agent of the Commission and successfully excused its failure to give prior notice by moving to expunge an order entered in pre-trial proceedings some five months previous directing the State to furnish counsel for the defendants "with a list of witnesses and copies of any written or oral statements in each cause." (A. 10, 25-6, 70) At this time, counsel for all Petitioners other than Lombardi moved for a mistrial and severance from Lombardi and for a severance of the conspiracy count from the substantive counts of the indictment. (A. 70, 81-3) The motions were denied. (A. 83) A renewed motion for a severance of the parties was again denied. (A. 91-4) Thereafter, to forestall further motions for severances, the State mooted the question by assuring the court that Lombardi's confession would not be used, "thereby removing a basis for the motion for severance," according to the trial court. (A. 407)

The motions for severance of parties and counts were renewed after the trial court overruled objections to the foregoing line of cross examination. (A. 407-8, 413-4)

The foundation having been laid by the cross examination, Walker was permitted to testify, on rebuttal, that, while he and Lombardi sat in the lobby of the hotel on August 7th waiting for the Chiagouris brothers and Messino, he asked Lombardi if there were not a way in which the loan could be paid off in one payment. Cautioned by the prosecutor not to name whose responsibility it was, Walker testified that Lombardi answered "it wasn't his responsibility" for setting a figure. Walker asked Lombardi if he had been "involved in" and "participated in" the beating of Jack and George in May. Lombardi said he did. Walker said he could not see the reason for it as they had been trying to repay the loan. Lombardi replied "they" had certain ways to collect and "they" didn't deviate from those methods. Walker said he did not want George to get a broken jaw like Jack got, and Lombardi said "Well, it was only a broken jaw, it could have been a lot worse." (A. 463)

Subsequent to Walker's testimony, the court instructed the jury that the evidence was to be considered by them "for the limited purpose of having you decide whether or not Joseph Lombardi has made out of court statements inconsistent with his testimony." The jury was also instructed that Walker's testimony "should not be considered for the purpose of establishing the truth of the facts related in the alleged conversation," and that "it was offered for impeachment purposes only." (A. 468)

Conduct of the Jury's Deliberation

Although the trial of this case took place over a span of nine weeks, only seventeen trial days were consumed in

hearing testimony. Of the seventeen witnesses who testified for the State, only two, Jack and George Chiagouris testified concerning the substantive offenses alleged to have been committed on May 7th. Albert Chiagouris testified to various conversations with Mercurio on that night. The remaining prosecution witnesses testified to observing various other meetings between the parties, or some of them, to certain alleged threats and statements by Lombardi on August 7th, and to other collateral matters.

The case was given to the jury at dinner time on Friday. The jury continued to deliberate through Friday night until 2:15 Saturday morning. (A. 496-9) They resumed deliberations at 10:00 A.M. Saturday and, one hour later, returned into open court where the following occurred:

> "The Court: Good morning Mr. Foreman?
>
> "The Foreman: Your Honor, we are no further. We are completely deadlocked, eleven and one. We are no further than we were last night at midnight, no further along, and there's nothing we can do about it. The party just don't believe the case was proven. * * *
>
> "The Court: You may retire to the jury room." (A. 500)

Immediately thereafter, counsel for Petitioners, expressing a fear that further deliberation would prove coercive on the juror who did not "believe the case was proven," moved for a mistrial. The motion was denied. (A. 501-3) At mid-day, the jury returned into open court and, in answer to an inquiry from the Court, said they were making progress and further deliberation would serve a useful purpose, that they "were getting along very good." (A. 503) The present verdicts were returned six hours later at approximately 6:00 p.m. (A. 504, 527)

REASONS FOR GRANTING THE WRIT

1. Coercion of jury's verdict denied Petitioners a fair trial by jury.

Incorporation of the Sixth Amendment right to trial by jury into those rights guaranteed defendants in state prosecutions by the Fourteenth Amendment (*Duncan* v. *Louisiana,* 391 U.S. 145 (1968); *Bloom* v. *Illinois,* 391 U. S. 194 (1968)) carries with it the further requirement that juries, and more particularly jury deliberations, be conducted in compliance with certain minimum standards of fairness. Cf. *Turner* v. *Louisiana,* 379 U.S. 466, 471-2 (1965). This Court has established minimum standards of fairness for the conduct of jury deliberations in the federal courts. In *Burton* v. *United States,* 196 U.S. 283 (1904), and again in *Brasfield* v. *United States,* 272 U. S. 448 (1926), the Court held that it was inherently coercive for a trial judge to inquire of a jury as to the extent of its numerical division during deliberations. See also, *United States* v. *Samuel Dunkel & Co.,* 2nd Cir. 1949, 173 F. 2d 506.

The Court of Appeals for the District of Columbia has intimated from these decisions that it is equally coercive for the trial judge to return the jury for further deliberations after receiving unsolicited advice as to the numerical division of the jury. Cf. *Mullin* v. *United States,* D.C.Cir. 1966, 356 F. 2d 368; *Williams* v. *United States,* D.C.Cir. 1964, 338 F. 2d 530; *Williams and Coleman* v. *United States,* D.C.Cir. 1968, ... F.2d ....., 4 Crl 3059. Other state decisions have concluded that unsolicited advice is equally as harmful as solicited advice, if that advice contains information concerning how many of the jurors stand on each side on the issue of guilt. See, *e.g., People* v. *Carter,* 60 Cal.Reptr. 297, 301 (1968). Indeed, the Illinois

Supreme Court has on one occasion suggested this distinction. See, *People* v. *Duskewycz*, 27 Ill.2d 257 (1963). The significant factor, as pointed out by the California Court, is that, once the standing of the jury has been made known to the trial judge, the jury members know he knows how the jury is inclined, and any action on his part indicating approbation of that standing is most likely to have a coercive effect on the minority members of the jury. See *People* v. *Carter*, 60 Cal.Reptr. 397, 301-2; *People* v. *Baumgartner*, 166 Cal.App.2d 103 (1958). This was implicit in *Mullin* v. *United States*, D.C.Cir. 1966, 356 F.2d 698, where the court approved of the trial judge's declaring a mistrial after receiving unsolicited advice, as "It would have been a precarious undertaking for the judge to give a supplemental charge to consider each other's views when he was already advised that only 4 of 12 jurors voted for acquittal." These cases considered the propriety of giving a version of the so-called "Allen Charge"[4] after the disclosure had been made, but coercion may result from conduct as well as from words.

Returning a jury for further deliberation upon being told that the jury is "completely deadlocked" eleven to one for conviction after approximately eight hours deliberation is as coercive as urging unanimity among the jury. Maintaining the deliberations for seven more hours signifies implicit agreement with the majority, who, undoubtedly, are encouraged to use this tacit approval of their stand to overcome the will of the minority. This is the type of jury-room atmosphere which *Brasfield* and *Burton* sought to avoid, for it is certain that the Court was not concerned with the trial judge's knowing how the deliberations of the jury had progressed, but rather with the

[4] *Allen* v. *United States*, 164 U.S. 492, 501-2 (1896).

effect which his knowledge would have on the jury once it returned to the jury room. As this Court has noted in another context, jurors are ever alert to the least suggestion from the trial judge as to his opinion on the merits of a case (*Quercia* v. *United States*, 289 U.S. 466, 470 (1933)), and any suggestion, whether by word or by action, that the judge holds a particular view would be treated with deference by those holding an opposite view and used with telling effect by those holding the same view.

The possibility of this occurring is so great that the Court laid down a flat proscription in *Brasfield* against any inquiry being made, leaving no room for speculation as to what did happen in the jury room. Here, the Illinois Court rejected Petitioners' claim and engaged in speculation as to what had happened in the jury room. (See App. A, *infra*, pp. 14-15) While we believe the reasons assigned by that Court are erroneous—for the actual issues involved in trial were not overly complicated and the task confronting the jury in sorting verdicts was not burdensome[5]—they are, nevertheless, precisely what *Burton* and *Brasfield* must be viewed as being designed to avoid—speculation as to what took place in the jury room.

Now that the Sixth Amendment right to jury trial has become effective in state as well as federal prosecutions, and in view of the longer standing requirements of fair

[5] 36 verdict forms were submitted to the jury. 18 related to guilty verdicts and 18 were "mirror" not guilty forms. Of these two sets of 18, 14 related to the events of May 7th only (2 kidnapping counts involving all 4 Petitioners, and 2 battery counts involving 3 Petitioners). Moreover, under the prosecution's theory of the case, Jack and George Chiagouris had been treated in exactly the same fashion, so that there was no complexity in resolving the kidnapping and the battery counts as to each alike. The number of verdict forms, therefore, presented a mechanical rather than a functional problem, if any.

trial by jury implicit in the due process clause of the Fourteenth Amendment (*Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961); *Turner* v. *Louisiana*, 379 U.S. 466, 471-2 (1965)), the Court should grant its writ of certiorari to determine whether the standard established for federal jury trials is of constitutional dimension.

2. Refusal to grant some Petitioners' motions for a severance denied these Petitioners their constitutional rights of confrontation, cross examination and fair trial.

The response which the Illinois Court made to Petitioners' claim that they had been denied their constitutional rights of confrontation, cross examination and fair trial by the introduction, during their joint trial, of Lombardi's August 7th statement to Walker illustrates a series of ever-occurring problems which arise as a result of this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968).

The Illinois Court suggested that the redaction of Lombardi's statement permitted its use. (App. A, *infra*, pp. 17-8) However the circumstances under which the statement was brought to the attention of the jury must have caused them to yield to the "nigh irresistible temptation to fill in the blanks" (Friendly, J., in *United States* v. *Bozza*, 2d Cir. 1966, 365 F.2d 206, 215) left by the omission of the co-defendants' names. Walker began his testimony on this matter by relating that Lombardi stated, in response to a question by him as to whether there were not a way to pay off loans, that the question of paying off the loans "wasn't his responsibility." The prosecutor suggested that the other co-defendants were involved by asking the witness: "* * * Without naming whose responsibility—was there further conversation?" The witness replied that Lombardi had said "that he wasn't responsible for setting

a figure." He also testified that, later on, he asked Lombardi if he had been "involved in" and "participated in" the May 7th beating of Jack and George Chiagouris, which was the direct subject of the aggravated battery counts and the forerunner of the kidnapping charges. Finally, in talking about these beatings, the witness said that Lombardi had told him "they" had ways of collecting on loans from which "they" did not deviate. The repeated use of plural forms incriminated the co-defendants just as surely as if their names had been employed. *United States ex rel. La Belle* v. *Mancusi*, 2nd Cir. 1968, 404 F.2d 690.

Bruton suggested, and most courts have followed the principle, that, to be effective, not only the direct and indirect identification of co-defendants, but, any statements which could be damaging to them once their identity is otherwise established must be eliminated. See, e.g., *State* v. *Young*, 46 N.J. 152, 215 A.2d 352 (1965); *People* v. *Cambell*, 299 N.Y.S.2d 280 (1969); *United States ex rel. LaBelle* v. *Mancusi*, 2nd Cir. 1968, 404 F.2d 690. Yet in this case, while the direct identification of those who "participated" and were "involved" in the alleged beatings, and who set the policies for collection and repayment of loans, was deleted, the prosecution was able to present the statement in such a fashion as to leave no doubt that Lombardi had incriminated the other defendants.

But the Illinois Court first ruled that *Bruton* was inapplicable because Lombardi had taken the stand in his own defense and had been available for cross examination. (App. A, *infra*, p. 17) This answer, we submit, ignores the spirit of and the fundamental constitutional considerations underlying *Bruton*. The Constitution, and necessarily *Bruton*, assume a meaningful and effective confrontation and cross examination of the "witness"

who made the accusation contained in the out-of-court statement. Thus, it is no answer to say that Lombardi was available for cross examination. When cross examined by the prosecution, he denied making the statement later attributed to him by Walker. At this juncture, further cross examination by his co-defendants on this subject would have been futile and meaningless. Later, on rebuttal, the prosecution first introduced evidence of the statement by Lombardi which incriminated his co-defendants. Under these circumstances, the witness who incriminated them—that is, the Lombardi who made the statement to Walker—did not accuse them in court and, in essence, the Petitioners had no opportunity to confront or cross-examine that witness.

This is the view taken by the California Supreme Court. Noting that "Some courts have taken the position that * * * *Bruton* is not intended to apply to the situation when the extrajudicially confessing co-defendant takes the stand and is subject to cross-examination (*Rios-Rameriz* v. *United States* (9th Cir. 1968), 403 F.2d 1016, 1017; *Santoro* v. *United States* (9th Cir. 1968), 402 F.2d 920, 922; *Lipscomb* v. *Maryland* (1968), 5 Md.App. 500, 506, 248 A.2d 491, 494)," the California Court adopted an opposite view in *In re Hill*, 80 Cal.Reptr. 537, 458 P.2d 449 (1969). Relying on the declaration in *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965), that a defendant must be given an "adequate opportunity" to cross examine the witnesses against him, on the holding of *Barber* v. *Page*, 390 U.S. 719 (1968), that the right to confrontation is basically a trial right, and on their own holding in *People* v. *Johnson*, 68 Cal.2d 646, 441 P.2d 111, *cert. den.* 393 U.S. 1051 (1969), that pre-trial statements by a recanting prosecution witness can not constitutionally be considered by the jury as substantive evidence, the Court held that "the Sixth Amendment right to

confrontation is intended to give to defendants in criminal cases the right to cross-examine as to statements made by the witness *at the time the witness makes those statements, before the same trier of fact which sits on the issue of his guilt* * * * *" *In re Hill,* 80 Cal.Reptr. 537, 547 (emphasis in original). The diversity of opinion which exists on this crucial issue since *Bruton* (noted in *Hill* and further represented by the decision of the Illinois Court here) warrants resolution by this Court. In a sense, *Bruton* only scratched the surface, for the question of whether or not to admit an extrajudicial statement by a testifying co-defendant is one which occurs with as much frequency as the original question considered in *Bruton.*

The Illinois Court also suggested that the statement here was admissible because the prosecution had a natural right to impeach Lombardi and show that his testimony was false. (App. A, *infra,* p. 17) This resolution of the problem ignores the rights of the co-defendants in the matter. They did not, as the trial judge explicitly noted,[6] call Lombardi as their witness. They were powerless to prohibit his taking the stand, or to control the content of his testimony. As a consequence, however, they were incriminated and prejudiced because he did testify and because the prosecution was permitted to impeach him by an incriminatory statement. Naturally, if the instruction not to consider the statement as evidence against persons not making it is ineffective, the instruction to consider the statement as impeaching evidence only must similarly be regarded as ineffective.

Certiorari should be granted to settle these important procedural problems which arise as an aftermath of *Bruton.*

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[6] "The Court: But this is not their witness." (R. 2869)

CONCLUSION

For the above and foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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